

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JUAN DUARTE, et al.,
 Plaintiffs,

v.

RUSSELL INVESTMENTS TRUST
 COMPANY, et al.,
 Defendants.

Case No. 2:21-cv-00961-CDS-BNW

**ORDER AND REPORT AND
 RECOMMENDATION**

Before the Court is Plaintiffs' Motion for Leave to File a Fourth Amended Complaint, in which they seek to amend their previously dismissed co-fiduciary claim and add two plaintiffs. ECF No. 131. The Caesars Defendants opposed, and Plaintiffs replied. ECF Nos. 146, 148. Because Plaintiffs' co-fiduciary claim was dismissed with prejudice, Plaintiffs were required to move for reconsideration of the Court's dismissal order to amend this claim. The Court therefore denies the Motion as to the co-fiduciary claim. But because the Caesars Defendants failed to establish that they would be prejudiced by the addition of the two plaintiffs, the Court grants the Motion to allow the Rubertons to join the case.

I. BACKGROUND

Plaintiffs brought this ERISA action because they allege that Defendants breached their fiduciary duties and caused Plaintiffs' retirement plans to lose more than \$100 million in potential investment earnings. *See generally* ECF No. 125. Plaintiffs initially brought a co-fiduciary claim against the Caesars Defendants¹ for allegedly enabling the Russell Funds' poor investment strategies. ECF No. 50 at ¶ 86. The Court, however, dismissed said claim. ECF No. 109 at 20, 22.

Plaintiffs have thrice amended their complaint, each time adding or removing named Plaintiffs. *See* ECF Nos. 1, 50, 125. Now they seek leave to file a fourth amended complaint to

¹ Caesars Holdings, Inc., the Plan Investment Committee, and the 401(k) Plan Committee.

1 reassert their co-fiduciary claim against the Caesars Defendants based on new evidence, and to
2 add two more plaintiffs. ECF No. 131.

3 **II. ANALYSIS**

4 Generally, a party may amend its pleading once “as a matter of course” within twenty-one
5 days of serving it, or within twenty-one days after service of a responsive pleading or motion
6 under Rule 12(b), (e), or (f). FED. R. CIV. P. 15(a)(1). Otherwise, “a party may amend its pleading
7 only with the opposing party’s written consent or the court’s leave.” FED. R. CIV. P. 15(a)(2).
8 “The court should freely give leave when justice so requires.” *Id.* “The court considers five
9 factors [under Rule 15] in assessing the propriety of leave to amend—bad faith, undue delay,
10 prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously
11 amended the complaint.” *United States v. Corinthian Colls.*, 655 F.3d 984, 995 (9th Cir. 2011).
12 “The standard for granting leave to amend is generous.” *Id.* “The party opposing the amendment
13 bears the burden of showing why leave should be denied, including the burden of establishing
14 prejudice.” *Underwood v. O’Reilly Auto Enterprises, LLC*, 342 F.R.D. 338, 343 (D. Nev. 2022)
15 (internal citations omitted).

16 **A. Co-Fiduciary Claim**

17 Plaintiffs seek to amend the complaint to reassert the co-fiduciary claim against the
18 Caesars Defendants that was previously dismissed by the Court. ECF No. 131 at 8–11. Plaintiffs
19 argue that discovery has revealed new evidence that the Caesars Defendants actively participated
20 in the decision to select the Russell Funds and that the Court previously dismissed their claim
21 because the Caesars Defendants represented that “they were not the ones making the relevant
22 decision.” *Id.* Now, Plaintiffs claim, they can sufficiently plead a co-fiduciary claim against the
23 Caesars Defendants based on the newly discovered evidence. *Id.*

24 The Caesars Defendants dispute amendment of this claim because they assert that it was
25 dismissed with prejudice. ECF No. 146 at 2–3. Thus, they contend, Plaintiffs cannot seek to
26 amend the claim through a motion for leave to amend and instead must move for reconsideration
27 of the Court’s dismissal order. *Id.*

1 Plaintiffs disagree, stating that the claim was *not* dismissed with prejudice. ECF No. 148
2 at 3–4. They also assert that, in any event, they satisfy both standards. *Id.* at 4–11.

3 The Court agrees with the Caesars Defendants that the claim was dismissed with
4 prejudice. In its dismissal order, the Court explained that the plain language of the ERISA statute
5 indicates that the co-fiduciary claim against the Caesars Defendants “may not proceed” because a
6 trustee is not liable “for the acts or omissions of a properly appointed investment manager.” ECF
7 No. 109 at 20. The Court did not find that Plaintiffs simply failed, at that stage, to plead sufficient
8 facts to allege a co-fiduciary claim against the Caesars Defendants or that there may exist facts
9 that Plaintiffs could plead to bring a viable claim upon amendment. *Id.* at 20, 22. Instead, the
10 Court plainly stated that under the statute, the “Caesars Defendant cannot be held liable for
11 breaches of co-fiduciary duty.” *Id.* at 20. Thus, the proper mechanism for seeking leave to amend
12 this claim is through a motion for reconsideration. *New York ex rel. Khurana v. Spherion Corp.*,
13 2019 WL 1274710, at *2 (S.D.N.Y. Mar. 20, 2019). The Court therefore denies Plaintiffs’ Motion
14 as to the co-fiduciary claim.

15 **B. Additional Plaintiffs**

16 Plaintiffs also seek to amend the complaint to add Plaintiffs Rick Ruberton and Linda
17 Ruberton. ECF No. 131 at 6. The Proposed Fourth Amended Complaint alleges that the
18 Rubertons were participants in the Plan from “at least 2016 to 2021” and that their accounts were
19 transferred to and invested in Russell Funds that only had Russell-Fund options. ECF No. 131-3
20 at 3–4. They allege that their accounts would be worth more if Defendants had not breached their
21 fiduciary duties. *Id.*

22 The Caesars Defendants oppose the addition of the Rubertons because they contend that it
23 would be prejudicial, as they would need to conduct additional discovery to determine the
24 adequacy of the new class representatives. ECF No. 146 at 10. They also assert that Plaintiffs
25 identify “no reason” why the Rubertons should be added and that they did not argue that the
26 current Plaintiffs are inadequate or insufficient, or that the Rubertons cover a subclass not
27 properly represented by the existing Plaintiffs. *Id.*
28

1 Plaintiffs counter that the Caesars Defendants failed to meet their burden of establishing
2 “substantial” prejudice because discovery in an ERISA case primarily concerns the defendants’
3 conduct, rather than actions taken by the plaintiffs. ECF No. 148 at 10. Thus, Plaintiffs contend,
4 the Caesars Defendants’ discovery burden will be limited to deposing the Rubertons. *Id.*

5 “[T]he Ninth Circuit has found that when amendment is sought during discovery, and no
6 trial date has been set, the timing of amendment does not cause undue prejudice.” *Snow Covered*
7 *Cap., LLC v. Fonfa*, No. 222CV01181CDSBNW, 2024 WL 343435, at *3 (D. Nev. Jan. 30,
8 2024) (citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187–88 (9th Cir. 1987)). Moreover,
9 “[t]he need for additional discovery alone does not establish undue prejudice.” *Story v. Midland*
10 *Funding LLC*, No. 3:15-CV-0194-AC, 2016 WL 5868077, at *4 (D. Or. Oct. 7, 2016) (citing
11 *Genentech, Inc. v. Abbott Lab.*, 127 F.R.D. 529, 530–31 (N.D. Cal. 1989)).

12 Here, Plaintiffs timely sought leave to amend within the discovery period. ECF No. 131.
13 Though discovery has since closed, other case deadlines have not yet passed. *See* ECF Nos. 139
14 (staying briefing on class certification), 150 (dispositive motion deadline set for September 16,
15 2024). And any potential prejudice to the Caesars Defendants can be mitigated by reopening
16 discovery to allow them to depose the Rubertons. Thus, the Court grants Plaintiffs’ Motion to
17 allow the addition of the Ruberton Plaintiffs.

18 CONCLUSION

19 **IT IS THEREFORE RECOMMENDED** that Plaintiffs’ Motion for Leave to File a
20 Fourth Amended Complaint (ECF No. 131) is GRANTED in part and DENIED in part, consistent
21 with this Order.

22 **IT IS FURTHER RECOMMENDED** that Plaintiffs’ request to amend their co-fiduciary
23 claim is DENIED. If Plaintiffs wish to amend this claim they must file a motion for
24 reconsideration.

25 **IT IS FURTHER ORDERED** that Plaintiffs’ request to amend their complaint to add
26 Plaintiffs Rick Ruberton and Linda Ruberton is GRANTED.

